



Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Regional Magistrates:	YES / NO
Circulate to Magistrates:	YES / NO

**IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE DIVISION, KIMBERLEY)**

Case No: 1629/ 2020
Argued: 21 May 2021
Date delivered: 30 July 2021

In the application of:-

JOHANNES ABRAHAM LOUW

APPLICANT

and

ENGIREX (PTY) LTD

FIRST RESPONDENT

BERTUS KILIAN

SECOND RESPONDENT

NEXUS (PTY) LTD

THIRD RESPONDENT

CORAM STANTON AJ

JUDGMENT

INTRODUCTION:-

- [1] Pursuant to the filing of an urgent application an interim order was granted on an *ex parte* basis in favour of the applicant on 25 September 2020 as follows:-

- 1.1 The first, alternatively the second, alternatively the first and second respondents were ordered to allow the applicant to place orders and procure fertilizer and chemicals from the third respondent through the first respondent and by way of the formal/official channels created by the first, alternatively the second, alternatively the first and second respondents;
 - 1.2 The first, alternatively the second, alternatively the first and second respondents were ordered to allow the applicant to deliver/sell/distribute the fertilizer and chemicals so procured to the clients of the applicant;
 - 1.3 The first, alternatively the second, alternatively the first and second respondents were interdicted from interfering in any way whatsoever with the applicant's ordering and procurement processes referred to in prayer 1.1;
 - 1.4 The first, alternatively the second, alternatively the first and second respondents were interdicted from interfering in any way whatsoever with the applicant's delivery/selling/distribution processes referred to in prayer 1.2; and
 - 1.5 The first, alternatively the second, alternatively the first and second respondents were interdicted from ordering/inciting/allowing any other person to interfere with the applicant's processes referred to in prayers 1.1 and 1.2.
- [2] The return date of the rule *nisi*, 23 October 2020, was extended on various occasions.
- [3] The respondents opposed the application and filed their answering affidavit on 04 November 2020. The replying affidavit was filed on 11 December 2020.

- [4] Prior to the application being ventilated, the dispute between the parties resolved itself. The applicant, however, persists in seeking the costs of this application from the first and second respondents. I am consequently required to determine the issue of costs.

EVALUATION OF THE EVIDENCE IN RESPECT OF THE MERITS OF THE APPLICATION:-

- [5] The gist of the dispute is whether the applicant was still an agent of the first respondent on 25 September 2020 when the interim order was granted.
- [6] Mr AD Olivier, on behalf of the applicant, submitted that the ties between the applicant and the first respondent had been severed in as far as the applicant's position as the first respondent's agent, with effect 15 November 2020, and, at the time of the filing of this application, he was still an agent of the first respondent and accordingly entitled to the relief he sought.
- [7] In addition, the applicant contends that he could therefore no longer order directly from the third respondent.
- [8] Mr DC Jankowitz, on behalf of the respondents, argued that the applicant himself ended the relationship between the applicant and the first respondent by way of a message *via* WhatsApp sent on 12 September 2020 as well as by way of telephone calls made by the applicant to the auditor of the first and second respondents.
- [9] According to the respondents, the applicant could have ordered and procured products from the third respondent directly.

EVALUATION OF THE EVIDENCE:-

- [10] The WhatsApp message sent on 12 September 2020 reads as follows:-

"Ek dink jul moet my uitbetaal en my ooreenkoms eindig".

- [11] On 12 September 2020 at 13:19 the second respondent *inter alia* replied to the WhatsApp message as follows:-

"Ek sal jou versoek aan die ander aandeelhouers oordra."

- [12] During the further WhatsApp exchange on 12 September 2020, the applicant was requested to confirm whether he would only be resigning as shareholder or as an agent as well. The applicant, however, failed to respond to this request.
- [13] Mr Olivier argued that the WhatsApp message cannot be construed as a formal resignation, but should merely be regarded as an indication of his intention to do so. In support of his argument he stated that the subsequent formal termination would not have been necessary if the applicant had in fact resigned by sending the WhatsApp message.
- [14] It is common cause that the applicant received a WhatsApp voice message from the second respondent on 17 September 2020 with the effect that the first respondent did not intend to conduct any further business with the applicant and that all contractual ties between the applicant and the first respondent were severed with immediate effect. According to the first respondent, the voice message was sent due to the applicant's verbal cancellation of the business relationship between the applicant and the first respondent.
- [15] In my view, the agency agreement between the applicant and the first respondent was terminated at the principal's insistence on 17 September 2020, prior to the issuing of this application.
- [16] The applicant failed to disclose that the marketing agreement between himself and the third respondent was cancelled on or about 23 September

2020, with three months notice. The cancellation preceded the interim order. Despite the cancellation, the third respondent nevertheless invited the applicant to place orders for the products directly with the third respondent until 23 December 2020, but he refused to do so.

- [17] The applicant simply cannot contend that the relief sought was required when he could have contracted directly with the third respondent and continued to deliver products to clients.

APPLICABLE LEGAL PRINCIPLES:-

- [18] Where an application is settled on a basis which disposes of the merits except insofar as the issue of costs is concerned, the Court should not have to hear evidence to decide who is liable for costs, but the Court should make an award as to costs with the material at its disposal.¹
- [19] It is common cause that the primary purpose of an award of costs is to compensate/indemnify a successful litigant for his/her expenses incurred in initiating or defending litigation.²
- [20] The issue of costs remains in the discretion of the Court, which discretion should be exercised judicially upon a consideration of all of the facts of each case.³
- [21] The decision as to whom the costs should be awarded in a matter is also a question of fairness to both parties.⁴
- [22] On a conspectus of the evidence, I am not persuaded that the applicant is entitled to a cost order.

¹ Law of Costs by AC Cilliers (Lexis Nexis) at page 2-16; Nxumalo and Another v Mavundla and Another 2000(4) SA 349 at 355E – H.

² Price Waterhouse Meyernel v Thoroughbred Breeders' Association of SA [2002] 4 All SA 723 (SCA) at paragraph [18].

³ Gelb v Hawkins [1960] 3 All SA 371 (A) at 376; Mouton v Die Mynwerkers Unie 1977 (1) All SA 242 (A) at 265.

⁴ See Gelb v Hawkins as well as Mouton v Die Mynwerkers Unie *supra*.

WHEREFORE THE FOLLOWING ORDER IS MADE:-

1. The rule *nisi* is discharged; and
2. The applicant is ordered to pay the first and second respondents' costs.



STANTON AJ
ACTING JUDGE

APPEARANCES:

For the applicant:

Advocate AD Olivier

On instruction of

Elliot Maris Attorneys

For the first and second respondents:

Advocate DC Jankowitz

On instruction of

Van de Wall Incorporated